

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ISAAC SCOTT CASTANEDA,

Petitioner,

v.

THERESA CISNEROS,

Respondent.

Case No. 1:20-cv-00377-JLT-HBK (HC)

FINDINGS AND RECOMMENDATIONS TO
GRANT RESPONDENT’S MOTION TO
DISMISS PETITION AS UNTIMELY¹

FOURTEEN-DAY OBJECTION PERIOD

(Doc. No. 24)

Petitioner Isaac Scott Castaneda (“Petitioner” or “Castaneda”), a state prisoner, initiated this action by filing a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1, “Petition”). In response, Respondent filed a Motion to Dismiss. (Doc. No. 24). Petitioner filed an opposition to the Motion to Dismiss and supplemental briefing after being directed by the Court. (Doc. Nos. 18, 27, 29). Petitioner did not file a response to Respondent’s Motion to Dismiss or the supplemental briefing, and the time for doing so has expired. For the reasons set forth more fully below, the undersigned recommends granting Respondent’s Motion to Dismiss.

I. BACKGROUND

Petitioner is serving a state prison sentence for his conviction of, *inter alia*, attempted

¹ This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

1 murder and possession of a firearm by a felon entered by the Kings County Superior Court on
2 February 13, 2014.² (Doc. No. 1 at 1). Petitioner's sentence was enhanced by findings of gang
3 membership and gun possession. (*Id.*). Petitioner was sentenced to forty-five years to life for the
4 attempted murder conviction, twenty-five years to life on the sentencing enhancements, and a
5 stayed six-year term on the possession of a firearm conviction. (Doc. No. 24 at 1-2).

6 Petitioner appealed the conviction to the California Court of Appeal, Fifth Appellate
7 District, which was affirmed on February 4, 2016. (Doc. No. 26-1). The California Supreme
8 Court denied review on April 20, 2016. (Doc. No. 26-3). Petitioner then filed six post-conviction
9 collateral challenges in the state courts, all petitions for writ of habeas corpus, as follows:³

10 1. Kings County Superior Court

11 Filed: February 13, 2017

12 Denied: April 3, 2017

13 2. California Court of Appeal, Fifth Appellate District

14 Filed: April 25, 2017

15 Denied: June 9, 2017

16 3. Kings County Superior Court

17 Filed: October 26, 2017

18 Denied: December 12, 2017

19 4. California Court of Appeal, Fifth Appellate District

20 Filed: February 21, 2018

21 Denied: April 27, 2018

22 5. California Supreme Court

23 Filed: December 12, 2018

24
25 ² Although Petitioner did not provide his date of conviction in his petition, the Court takes judicial notice
26 of Petitioner's date of conviction on the Kings County Superior Court online case database under Federal
27 Rule of Evidence 201. See <https://cakingsportal.tylerhost.net/CAKINGSPROD/Home/Dashboard/29>, last
28 accessed August 15, 2022.

³ Unless otherwise indicated, pursuant to the mailbox rule, the Court deems the various petitions filed on
the dates they were signed and presumably handed to the prison authorities for mailing. *Houston v. Lack*,
487 U.S. 266, 276 (1988); *Campbell v. Henry*, 614 F.3d 1056, 1059 (9th Cir. 2010).

1 Denied: May 1, 2019

2 6. California Supreme Court

3 Filed: March 15, 2020⁴

4 Denied: July 22, 2020

5 (Doc. Nos. 26-4 – 26-15). On March 2, 2020, Petitioner filed the instant Petition. Petitioner
6 makes the following claims for relief: (1) newly discovered evidence proves he is innocent of his
7 crimes of conviction; (2) the state court erred when it declined to hold a hearing on the newly
8 discovered evidence; and (3) prosecutorial and trial court errors violated his constitutional rights.
9 (Doc. No. 1 at 4-9).

10 Respondent contends the Petition should be dismissed because it is untimely and the
11 actual innocence exception to the statute of limitations should not apply. (*See generally* Doc.
12 Nos. 24, 29). Petitioner did not file any response to the Motion to Dismiss or the supplemental
13 briefing. However, in his earlier briefing Petitioner argues that he should be entitled to gap
14 tolling for the periods during which he was seeking state habeas review; equitable tolling due to
15 the ineffectiveness of his trial and appellate counsel; and, in the alternative, equitable tolling of
16 the statute of limitations under the actual innocence gateway described in *Schlup v. Delo*, 513
17 U.S. 298 (1995) and *McQuiggin v. Perkins*, 569 U.S. 383 (2013). (*See* Doc. Nos. 10, 19).

18 II. APPLICABLE LAW AND ANALYSIS

19 Under Rule 4, if a petition is not dismissed at screening, the judge “must order the
20 respondent to file an answer, motion, or other response” to the petition. R. Governing 2254 Cases
21 4. The Advisory Committee Notes to Rule 4 state that “the judge may want to authorize the
22 respondent to make a motion to dismiss based upon information furnished by respondent.” A
23 motion to dismiss a petition for writ of habeas corpus is construed as a request for the court to
24 dismiss under Rule 4 of the Rules Governing Section 2254 Cases. *O’Bremski v. Maass*, 915 F.2d

25 ⁴ Respondent points out Petitioner signed the sixth state petition on March 15, 2020, which is also the date
26 on the proof of service. (*See* Doc. No. 26-14). However, the file-stamp date on the state petition is May 8,
27 2020. (*Id.* at 1). “Although it is not probable that the sixth state petition took two months to process,
28 Respondent, without conceding the issue and while recognizing the possibility that COVID-19 may have
impacted institutional procedures, has listed the filing date of the sixth state petition as March 15, 2020,
the earlier of the two dates.” (Doc. No. 24 at 3 n.4).

418, 420 (9th Cir. 1990). Under Rule 4, a district court must dismiss a habeas petition if it “plainly appears” that the petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

A. Petition Not Timely Filed Under AEDPA’s Statute of Limitations

Title 28 U.S.C. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, sets a one-year period of limitations to the filing of a habeas petition by a person in state custody. This limitation period runs from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). For most habeas petitioners, the one-year clock starts to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 42 U.S.C. § 2244(d)(1)(A). In this case, the California Supreme Court denied review on April 20, 2016. Thus, direct review concluded on July 19, 2016, when the ninety (90) day period for seeking review in the United States Supreme Court expired. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); U.S. Sup. Ct. R. 13. For the purposes of § 2244(d)(1)(A), AEDPA’s one-year statute of limitations began running the next day on July 20, 2016. (Doc. No. 24 at 3). Petitioner had until July 19, 2017 to file his federal habeas petition, absent statutory or equitable tolling. *See Patterson v. Stewart*, 251 F.3d 1243, 1246-47 (9th Cir. 2001) (adopting anniversary method to calculate one-year statutory period). Petitioner filed his federal petition on March 2, 2020. (Doc. No. 1). Thus, absent any applicable tolling, the instant petition is barred by the statute of limitations.

1. Commencement of Limitations Period

Under § 2244(d)(1)(D), the limitations period shall run from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” However,

Section 2244(d)(1)(D) provides a petitioner with a later accrual date than section 2244(d)(1)(A) only ‘if vital facts could not have been known’ ” by the date the appellate process ended. *Schlueter*, 384 F.3d at 74 (*quoting Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir.2000)). The “due diligence” clock starts ticking when a person knows or through diligence could discover the vital facts, regardless of when their legal significance is actually discovered. *See Hasan*, 254 F.3d at 1154 n. 3; *see also Redd v. McGrath*, 343 F.3d 1077, 1082 (9th Cir.2003).

Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012) (internal citation and quotation marks omitted). In earlier briefing, Petitioner argued the affidavits submitted in support of his actual innocence claim, discussed in detail below, were not “discovered until the AEDPA 1-year time limit had already begun to run.” (Doc. No. 13). Petitioner also argued in separate briefing that he is entitled to an unidentified later “trigger date” under § 2244(d)(1)(D) because he continued to exercise due diligence despite the alleged ineffectiveness of trial and appellate counsel. (*See generally* Doc. No. 19).

Petitioner’s argument that he is entitled to a later commencement date of the limitations period and vague and conclusory. Furthermore, Petitioner fails to specifically identify a date the statute of limitations period should run from pursuant to § 2244(d)(1)(D), *i.e.* the date when he “discovered” the purported new evidence in the form of affidavits supporting his actual innocence claim, or the date he “discovered” ineffectiveness of trial and appellate counsel. Moreover, this evidence was readily discoverable at any time during the trial or immediately thereafter. As discussed below with respect to the affidavits regarding the victim’s alleged motivation to falsely identify him as the shooter, Petitioner attempted during his trial to impeach the credibility of the victim by making the same argument – that the victim named Petitioner as the shooter due to a longstanding “grudge” against Petitioner for sleeping with the mother of his child. And Petitioner’s own summary of his “due diligence” regarding his claims of ineffective assistance of counsel acknowledges that he was aware of “vital facts” by the date the appellate process ended.

1 *See Ford*, 683 F.3d at 1235.

2 *Supra*, under § 2244(d)(1)(D), the statute of limitations runs from the time the facts were
 3 known or could have been discovered, not from the time Petitioner discovered, or endeavored to
 4 discover through due diligence, a possible legal significance. Petitioner fails to show he
 5 exercised the requisite due diligence to justify a delayed accrual date for his claims of actual
 6 innocence and ineffectiveness of counsel. Thus, Petitioner is not entitled to a later trigger of the
 7 AEDPA statute of limitations pursuant to § 2244(d)(1)(D). Moreover, even if the Court
 8 recalculates the statute of limitations from the later accrual date of Petitioner's habeas petition
 9 filed on October 26, 2017, wherein he asserts the actual innocence claim in a habeas petition to
 10 the state superior court based on the 2017 "newly discovered" affidavits, the Petition would still
 11 be untimely, as discussed in detail below.

12 **2. Statutory Tolling**

13 The federal statute of limitations tolls for the "time during which a properly filed
 14 application for State post-conviction or other collateral review with respect to the pertinent
 15 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). An application for post-conviction or
 16 other collateral review is "pending" in state court "as long as the ordinary state collateral review
 17 process is 'in continuance'—*i.e.*, 'until the completion of that process.'" *Carey v. Saffold*, 536
 18 U.S. 214, 219 (2002) (citations omitted). "California's collateral review system differs from that
 19 of other States in that it does not require, technically speaking, appellate review of a lower court
 20 determination." *Id.* at 221. Instead, petitioners are required to file an original habeas petition and
 21 a subsequent appeal in each level of court (superior, appellate, and supreme) within a
 22 "reasonable" period. *Id.* at 221-22; *Robinson v. Lewis*, 9 Cal. 5th 883, 897 (2020) ("There are no
 23 specific time limits for either filing the first [habeas] petition or filing subsequent petitions in a
 24 higher court. Instead, California courts employ a *reasonableness* standard. The claim must
 25 generally be presented without substantial delay."). A petition is considered no longer "pending,"
 26 and the petitioner is barred from AEDPA statutory tolling, if an unreasonable amount of time
 27 elapsed between the filing of state court habeas petitions. *Saffold*, 536 U.S. at 221.

28 To determine whether a habeas claim was filed within a reasonable amount of time,

1 California courts consider three factors. *Robinson*, 9 Cal. 5th at 897. First, “a claim must be
 2 presented without *substantial delay*.” *Id.* (emphasis in original). “‘Substantial delay is measured
 3 from the time the petitioner or his or her counsel knew, or reasonably should have known, of the
 4 information offered in support of the claim and the legal basis for the claim.’” *Id.* (quoting *In re*
 5 *Robbins*, 18 Cal. 4th 770, 780 (1998)). Second, if a petition was filed with substantial delay, a
 6 petition may yet be considered on the merits if the “petitioner can demonstrate *good cause* for the
 7 delay.” *Id.* (emphasis in original). Third, a petition filed without good cause for substantial delay
 8 will be considered if it falls under one of four narrow exceptions. *Id.* Only three of the four
 9 exceptions are relevant to noncapital cases: (1) the “‘error of constitutional magnitude led to a
 10 trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have
 11 convicted the petitioner;” (2) “‘the petitioner is actually innocent of the crime or crimes of which
 12 he or she was convicted;” and (3) “‘the petitioner was convicted or sentenced under an invalid
 13 statute.’” *In re Reno*, 55 Cal. 4th 428, 460 (2012) (quoting *Robbins*, 18 Cal. 4th at 780). The
 14 California Supreme Court has opined that a six-month gap delay would normally be “unduly
 15 generous,” but adopted “a time period of 120 days as the safe harbor for gap delay” for the filing
 16 of habeas petitions between state court levels. *Robinson*, 9 Cal. 5th at 901. “A new petition filed
 17 in a higher court within 120 days of the lower court’s denial will never be considered untimely
 18 due to gap delay.” *Id.*

19 For petitions filed in a “reasonable time,” a petitioner may count as “pending” the “days
 20 between (1) the time the lower state court reached an adverse decision, and (2) the day he filed a
 21 petition in the higher state court.” *Evans v. Chaviz*, 546 U.S. 189, 193 (2006). This Court “must
 22 itself examine the delay in each case and determine what the state courts would have held in
 23 respect to timeliness.” *Id.* at 198.

24 Here, AEDPA’s statute of limitations began running on July 20, 2016, at the conclusion of
 25 direct review per § 2244(d)(1)(A), and continued to run until Petitioner filed his first state habeas
 26 petition on February 13, 2017. (*See* Doc. No. 26-4). “AEDPA’s statute of limitations is not
 27 tolled from the time a final decision is issued on direct state appeal and the time the first state
 28 collateral challenge is filed because there is no case ‘pending’ during that interval.” *Nino v.*

1 *Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). Accordingly, 208 days elapsed on the AEDPA
 2 clock between the conclusion of direct review and the filing of Petitioner’s first state habeas
 3 petition. As noted by Respondent, the limitations period was then tolled from February 13, 2017,
 4 the date Petitioner filed his first state habeas petition, through June 9, 2017, the date the state
 5 appellate court denied Petitioner’s habeas petition. *Id.* at 1006-07 (The limitations period
 6 “remains tolled during the intervals between the state court’s disposition of a state habeas petition
 7 and the filing of the petition at the next state appellate level.”); *Delhomme v. Ramirez*, 340 F.3d
 8 817, 821 n.3 (9th Cir. 2003) (“[T]he crucial issue for tolling purposes is whether the petitioner has
 9 timely proceeded to the next appellate level, since the one year filing period is tolled to allow the
 10 opportunity to complete one full round of review.”). Thus, the AEDPA clock commenced
 11 running again on Monday, June 12, 2017.⁵

12 As noted by Respondent, after the state appellate court denied Petitioner’s state habeas
 13 petition, Petitioner “proceeded downward” by filing a petition in state superior court, that raised a
 14 different claim than those raised in the previous state petitions. (Doc. No. 24 at 6). Statutory
 15 tolling is not available for intervals between separate rounds of state post-conviction proceedings.
 16 *See Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003) (application for post-conviction relief
 17 is pending during the “intervals between a *lower* court decision and a filing of a new petition in a
 18 *higher* court”); *Welch v. Newland*, 350 F.3d 1079, 1083 (9th Cir. 2003) (a petitioner ‘is not
 19 entitled to statutory tolling during the period of inaction between his separate applications for
 20 relief in the California state courts.”); *Stockton v. Barnes*, 2014 WL 5325422, at *6 (E.D. Cal.
 21 Oct. 17, 2014) (“Because petitioner did not proceed up the ladder to the next higher court, such
 22 filing does not toll the limitations period.”). Therefore, the AEDPA clock continued to run for
 23 another 136 days—from June 12, 2017 until the filing of Petitioner’s filed his third state petition
 24 on October 26, 2017. Thus, including the 208 days that had elapsed before Petitioner filed his
 25 first state habeas petition, a total of 344 days ran on the limitation period before Petitioner filed
 26 his third state habeas petition.

27
 28 ⁵ Because June 10, 2017 was a Saturday, the Court restarts AEDPA’s clock on the next business day,
 Monday, June 12, 2017.

1 AEDPA's limitations period was then tolled from October 26, 2017, the date Petitioner
2 filed his third state habeas petition, through April 27, 2018, the date the state appellate court
3 denied Petitioner's fourth habeas petition, because Petitioner proceeded in a diligent manner and
4 filed his fourth habeas petition in the appellate court 71 days after the denial of his third petition
5 in superior court. *See Nino*, 183 F.3d at 1006-07. However, Petitioner did not file his fifth state
6 court petition until December 12, 2018, more than seven months after his fourth petition was
7 denied on Friday, April 27, 2018. This delay is substantially longer than the 120-day "safe
8 harbor" gap delay for the filing of habeas petitions between state court levels. *See Robinson*, 9
9 Cal. 5th at 901. Thus, because Petitioner failed to present his fifth petition to the California
10 Supreme Court without substantial delay and offered no argument as to good cause for this delay,
11 it was not presented within a reasonable amount of time and the AEDPA clock continued to run
12 as of Monday, April 30, 2018 and continued to run for 21 days until it expired on May 21, 2018.⁶
13 Petitioner did not file the Petition until March 2, 2020, exceeding the one year period of
14 limitations by over twenty-one months.

15 In earlier briefing, Petitioner generally argues that he has "met the requirement for gap
16 tolling" because "newly discovered evidence" was filed in the superior court within the
17 "reasonable time limit." (Doc. No. 10 at 2). The discovery of new evidence can constitute good
18 cause for the purposes of gap tolling if the petitioner could not have discovered the new evidence
19 prior to the filing of the state habeas petition in the lower court. *See Rouse v. Perez*, 2017 WL
20 3174534, at *3 (S.D. Cal. July 26, 2017); *Davis v. Kibler*, 2022 WL 2121907, at *4 (C.D. Cal.
21 Feb. 24, 2022). Petitioner argues he is entitled to gap tolling because the affidavits contained in
22 this habeas petition could "have come no sooner" than June 2017. (Doc. No. 10 at 1).
23 Specifically, "the alleged victim [] informed [the affiant] through casual conversation that he had
24 perjured himself by stating the petitioner was the one who shot at him because the petitioner was
25 now involved in a sexual relationship with the victim's child's mother." (*Id.*). This argument

26 ⁶ The fifth and sixth petitions, both filed in the California Supreme Court, on December 12, 2018 and
27 March 15, 2020, respectively, had no tolling consequence because the limitations period would have
28 already expired. *See Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000) (Petitioner is not entitled to
tolling where the limitations period has already elapsed).

1 lacks merit. The contention that the victim falsely accused Petitioner of shooting him because he
2 held a “grudge” was made in an attempt to discredit the victim during the trial. Thus, the
3 “discovery” of evidence does not constitute good cause to excuse substantial delays identified
4 above because Petitioner already knew the underlying facts of the “new evidence” before he filed
5 his first habeas petition with the superior court. *See Rouse*, 2017 WL 3174534, at *3.

6 Moreover, even were the Court to find good cause for the delay in filing this additional
7 petition, which raised the claims based on “new evidence” identified by Petitioner for the first
8 time, the Petition would still be time barred. As noted above, Petitioner’s fourth petition was
9 denied by the appellate court on Friday, April 27, 2018 but Petitioner did not file his fifth state
10 court petition until 227⁷ days later, on December 12, 2018. Because Petitioner failed to present
11 his fifth petition to the California Supreme Court without substantial delay, and offered no
12 argument as to good cause for this particular delay, it was not presented within a reasonable
13 amount of time. Consequently, even if the Court gave Petitioner the benefit of tolling for the
14 entire time between June 9, 2017 and Monday, April 30, 2018, when the AEDPA clock restarted,
15 the one-year AEDPA limitation period would have expired 157 days later on October 4, 2018.
16 Thus, even with the benefit of the “newly discovered evidence,” the Petition filed on March 2,
17 2020, was untimely by 515 days (16 months and 27 days).

18 Therefore, the Petition must be dismissed as time barred unless Petitioner can demonstrate
19 that he is entitled to equitable tolling or he satisfies the narrow gateway of actual innocence under
20 *Schlup*.

21 **3. Equitable Tolling**

22 AEDPA’s statutory limitations period may be equitably tolled. *Holland v. Florida*, 560
23 U.S. 631, 645 (2010). Equitable tolling is available if a petitioner shows: “(1) that he has been
24 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and
25 prevented timely filing.” *Id.* at 649. To show “extraordinary circumstances,” a petitioner must
26 show that “the circumstances that caused his delay are both extraordinary and beyond his
27

28 ⁷ The Court credits Petitioner with two days due to April 27, 2018 falling on a Friday.

1 control”—a high threshold. *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S.
2 250, 255 (2016). “The requirement that extraordinary circumstances ‘stood in [a petitioner’s]
3 way’ suggests that an *external* force must cause the untimeliness. *Waldron-Ramsey v. Pacholke*,
4 556 F.3d 1008, 1011 (9th Cir. 2009) (emphasis added). Furthermore, a petitioner must show that
5 the extraordinary circumstances *caused* the untimely filing of his habeas petition. *See Bills v.*
6 *Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (citing *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir.
7 2003) (explaining that equitable tolling is available only when the extraordinary circumstances
8 were the cause of the petitioner’s untimeliness); *Smith v. Davis*, 953 F.3d 582, 595 (9th Cir. 2020)
9 (“Whether an impediment caused by extraordinary circumstances prevented timely filing is a
10 ‘causation question.’”).

11 To demonstrate that he has been pursuing his rights diligently, a petitioner must show that
12 he has “been reasonably diligent in pursuing his rights not only while an impediment to filing
13 caused by an extraordinary circumstance existed, but before and after as well, up to the time of
14 filing his claim in federal court.” *Smith*, 953 F.3d at 598-99. In other words, “when [a petitioner]
15 is free from the extraordinary circumstance, he must also be diligent in actively pursuing his
16 rights.” *Id.* at 599. The diligence required for equitable tolling does not have to be maximum
17 feasible diligence, but rather reasonable diligence. *Holland*, 560 U.S. at 653. And the court is not
18 to impose a rigid impossibility standard on petitioners, especially *pro se* prisoner litigants “who
19 have already faced an unusual obstacle beyond their control during the AEDPA litigation period.”
20 *Fue v. Biter*, 842 F.3d 650, 657 (9th Cir. 2016) (quoting *Sossa v. Diaz*, 729 F.3d 1225, 1236 (9th
21 Cir. 2013)). However, “in every instance reasonable diligence seemingly requires the petitioner
22 to work on his petition with some regularity—as permitted by his circumstances—until he files it
23 in the district court.” *Smith*, 953 F.3d at 601. Because Petitioner must show diligence before,
24 during, and after extraordinary circumstances prevented him from filing, the relevant time period
25 of the court’s analysis is July 20, 2016, the day the statute of limitations began to run, to March 2,
26 2020, the day Petitioner signed and constructively filed his federal petition. *See Smith*, 953 F.3d
27 at 598-99. Admittedly, “the threshold necessary to trigger equitable tolling under AEDPA is very
28 high, lest the exceptions swallow the rule.” *Miranda v. Castro*, 292 F.3d 1062, 1066 (9th Cir.

2002) (citations omitted).

Petitioner argues equitable tolling applies because through “ongoing diligence” he discovered “important facts” that both trial counsel and appellate counsel were “ineffective at trial and on appeal.” (Doc. No. 19 at 11). In support of this argument, Petitioner cites, and attaches as exhibits, letters from his appellate counsel from July 2014 through May 2016, including responses to Petitioner’s requests for “pieces of evidence”; appellate counsel’s response that she did not request certain documents as part of the appeal “as the appeal is concerned with what happened at trial”; and appellate counsel’s repeated requests to “excuse her delay in responding” to his ongoing letters. (*See generally* Doc. No. 19).

Generally, attorney negligence is not a sufficient basis for applying equitable tolling to the 2244(d)(1) limitation period. *See Holland v. Florida*, 560 U.S. 631, 651-52 (2010); *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003) (“ordinary attorney negligence will not justify equitable tolling”). More notably in this case, while Petitioner claims he has “shown due diligence” by “continuing to pursue his claim,” he fails to cite any “extraordinary circumstance,” much less any specific allegation of ineffective assistance of appellate counsel, that caused his failure to timely file his petition. (*See generally* Doc. No. 19); *see Smith*, 953 F.3d at 591 (“if an extraordinary circumstance is not the cause of a litigant’s untimely filing, then there is nothing for equity to address”). Rather, the correspondence that Petitioner summarizes, presumably as the factual predicate for his ineffective assistance of counsel claim, took place between 2014 and 2016, prior to the relevant time period of July 20, 2016—the day the statute of limitations began to run and March 2, 2020—the day Petitioner signed and constructively filed his federal petition. Thus, Petitioner has not demonstrated how his counsel’s alleged ineffectiveness prevented him from timely filing his Petition; nor does he make a showing of diligence during the relevant time period, as required for the granting of equitable tolling. *See Smith*, 953 F.3d at 599.

The undersigned finds Petitioner fails to carry his burden of demonstrating extraordinary circumstances that caused the untimely filing of his Petition. Consequently, the undersigned recommends that Petitioner be denied equitable tolling and his petition be dismissed as untimely.

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4. Actual Innocence

“Actual innocence, if proved, serves as a gateway through which a prisoner may pass” where he has failed to meet AEDPA’s statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383 (2013); *see also Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc). Under the “actual innocence gateway” of *Schlup*, a petitioner’s procedurally barred claim may be considered on the merits if his claim of actual innocence is sufficient to implicate a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Majoy v. Roe*, 296 F.3d 770, 775-76 (9th Cir. 2002); *Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir.1997) (en banc). If petitioner presents “evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.” *Schlup*, 513 U.S. at 316.

“[A] petitioner does not meet the [actual innocence] threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 329. “[H]abeas corpus petitions that advance a substantial claim of actual innocence are extremely rare.” *Id.* at 321. However, “[a] petitioner need not show that he is ‘actually innocent’ of the crime he was convicted of committing; instead, he must show that ‘a court cannot have confidence in the outcome of the trial.’” *Majoy*, 296 F.3d at 776 (quoting *Schlup*, 513 U.S. at 316 and *Carriger*, 132 F.3d at 478).

In analyzing this innocence claim, the federal habeas court “must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citation omitted). “Based on this total record, the court must make ‘a probabilistic determination about what reasonable, properly instructed jurors would do.’” *Id.* (quoting *Schlup*, 513 U.S. at 329). This “new evidence” must only be newly presented, not newly available. *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003) (finding that medical records made before the start of trial, but not presented at trial, were “new evidence” in support of petitioner’s actual innocence claim); *but see Chestang v. Sisto*, 522

F. App'x 389, 391 (9th Cir. 2013) (newly acquired witness declaration not sufficiently "new" to support actual innocence claim because contents were within defendant's knowledge at time of trial and no explanation was given for not introducing it sooner).

a. Trial Evidence

In order to put the "new" evidence offered by Petitioner in support of his actual innocence argument in context, the undersigned includes the following summary of relevant trial evidence found in the February 4, 2016 California Court of Appeals opinion affirming the judgment of the trial court:⁸

During the afternoon of April 27, 2012, in Lemoore, Andrew Otto was driving home in his turquoise Mustang after running errands, when he noticed that a black sports utility vehicle (SUV), possibly an Expedition, was following him. The SUV had two occupants. Otto could not identify the driver but recognized the passenger as Castaneda, whom he knew very well.

Otto wanted to confirm that the SUV was following him, so he pulled into the parking lot of an auto parts store. The SUV pulled in behind him. Not wanting to have the SUV follow him home, Otto then drove to a liquor store. He got out of his car and went into the liquor store. He bought two bottles of water and a lottery scratcher. When Otto came out of the liquor store, he saw the black SUV parked in the store's lot. Otto got into his car and drove off. The black SUV continued to follow him.

Otto drove to his apartment complex and parked his car alongside the curb. The black SUV cruised slowly by, to the right of Otto's car, and then stopped. Otto walked along the sidewalk towards the SUV. Shrugging his shoulders and raising his hands with his palms open, he asked, "What's up?" Castaneda got out of the SUV on the passenger side, went around to the back of the SUV, pulled out a gun, and fired two shots at Otto. Otto took off running as a bullet grazed his arm; he heard another shot as he ran.

Officer Mark Pescatore, who was dispatched to the scene, viewed video recordings from the apartment complex's video surveillance system. The entire series of events that unfolded in front of the complex was captured on video, which showed Otto pulling up in his Mustang, followed by the black SUV; Otto walking over to the black SUV; a passenger exiting the SUV and two muzzle flashes emanating from the passenger's position behind the SUV; and Otto

⁸ On federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'") (citing Section 2254(e)(1)).

1 running away. Pescatore also detected what he termed as “bullet
2 splash” on an exterior building wall behind the spot where Otto was
3 standing at the time. The officer explained that “bullet splash”
4 refers to localized damage to stucco at the point of impact of a
5 bullet. In addition, Pescatore obtained video recordings from the
6 video surveillance system of the liquor store where Otto had
7 stopped; the video showed Otto leaving the store’s parking lot
8 followed by the black SUV.

9 Otto, who was 32 years old at the time of trial, testified that he had
10 known Castaneda since the sixth grade; in fact, Castaneda used to
11 be one of his best friends. Otto and Castaneda were members of the
12 Brown Pride Norteños, a subset of the Norteño gang in the
13 Lemoore area. Otto had been affiliated with the Brown Pride
14 Norteños since he was 10 or 11 years old, and had vouched for
15 Castaneda when the latter sought to join the gang. However, Otto
16 and Castaneda grew apart in 2003, after Castaneda slept with the
17 mother of Otto’s children.

18 Also in 2003, Otto dropped out of the Norteños following 15 years
19 of active participation in the gang and gang-related criminal
20 activities. He dropped out in part because he completed a prison
21 drug rehabilitation program with members of a rival gang.
22 According to Otto, the Norteños deemed members who participated
23 in prison programs with members of rival gangs to be “no good”
24 and “[n]ot in good standing” within the gang. He also testified that
25 the Norteños viewed dropouts as traitors. Indeed, Norteño members
26 would attack dropouts so as to gain increased prestige within the
27 gang.

28 Officer John Paul Henderson of the Hanford Police Department
testified for the prosecution as an expert witness on criminal street
gangs in Kings County. Henderson opined that Castaneda was a
member of the Brown Pride Norteños, an aggressive and violent
Norteño subset based in Lemoore. Henderson testified that Norteño
affiliates engaged in robberies, drug sales, deadly weapon assaults,
drive-by shootings, and murders. He also believed Otto was a
Norteño dropout based on the fact that the California Department of
Corrections had classified him as such and had placed him in the
“sensitive needs yard” during his prison commitments. He
explained that “dropouts [are] no longer welcomed in their gang”
and would be killed in prison if not segregated into “sensitive needs
yards.”

Henderson testified about various aspects of Norteño culture. He
stated the Norteño gang is governed by a set of rules known as the
“14 bonds.” The gang retaliates against members who break the
bonds. Such retaliation ranges from assault to murder, but
ultimately depends on “political” considerations such as the status
of the offending gang member, with higher-status members
suffering fewer consequences. Dropping out of the gang is a
violation of the bonds and dropouts are considered enemies of the
gang. Consequently, the gang authorizes its rank-and-file members
to attack dropouts without obtaining advance permission from the
gang’s command structure as is required for other crimes

1 committed on behalf of the gang.

2 Henderson explained that a gang member who shoots or kills a
3 dropout gains respect and status in the gang. Gang members
4 commit attacks on dropouts, members of rival gangs, and law
5 enforcement personnel to advance themselves within the gang
6 hierarchy: “Rival gangs, dropouts, and cops are three of the top
7 things that are going to get [a gang member] the most respect and
8 status within [the] gang. So if you get any one of those three, you
9 could be a nobody, who can turn into a guy who may be calling
10 shots within a certain time.” Henderson believed that in attacking
11 Otto, Castaneda was enforcing the bonds. More specifically, he
12 explained, “when you become a gang member, you’re told the rules
13 and you’re told you will assault dropouts ... and he’s just following
14 the rules and being a good soldier.”

9 On the day of the shooting, Otto was wearing black clothes,
10 including a black T-shirt with the words, “Step your game up, get
11 on my level.” Henderson testified that while a dropout dressed in
12 red clothing would draw the gang’s attention because red is the
13 color associated with Norteños historically, a dropout’s choice of
14 black clothing would not be particularly significant for the gang
15 despite the fact that gang members sometimes wear black and white
16 clothing to “throw law enforcement off.” As for the words on
17 Otto’s shirt, Henderson testified that in his experience with gang
18 members, he had “never seen that shirt or that wording,” but he did
19 not rule out the possibility that the words “could” have a gang-
20 related meaning if the wearer was involved in a gang. Finally,
21 Henderson agreed that Otto’s words, “[w]hat’s up,” coupled with
22 his open-palmed gesture, “could,” depending on the context, be
23 interpreted as an aggressive gesture.

17 Castaneda did not testify, nor did the defense call any other
18 witnesses.

19 (Doc. No. 26-1 at 3-6). Of particular relevance in the analysis of Petitioner’s actual innocence
20 claim, the Court notes that Otto also testified during the trial that he talked to four different law
21 enforcement officers the night of the shooting. (Doc. No. 32 at 109). He testified he was
22 forthcoming with the officers within minutes of speaking to them, and stated he did not reveal the
23 identity of the shooter right away because he was in shock, angry, and wanted to “go take care of
24 it himself.” (*Id.* at 109-12). He also feared for his family and attempted to avoid coming to trial,
25 but chose to cooperate because “it’s the right thing to do.” (*Id.* at 113). Otto also testified that he
26 assaulted Petitioner ten years earlier when he found out Petitioner slept with Otto’s wife, but then
27 let the incident go; and he “protected” Petitioner when Petitioner was investigated by the Norteño
28 gang for sleeping with Otto’s wife. (*Id.* at 100-05).

Officer Alvaro Santos testified that Otto was scared, out of breath like he had been running, and was upset when he first encountered him; and Otto provided him with limited information and explained that although Otto told him he knew the identity of the shooter, he would not reveal it at the time. (*Id.* at 54, 58-59). Officer John Paul Henderson testified that Otto told him when he first spoke to him at the scene of the shooting that Petitioner shot him, and that Otto was concerned with speaking to law enforcement for fear his family would be harmed. (*Id.* at 301). Officer Henderson was also informed by another officer at the scene that Otto told him Petitioner “always had a grudge against me since” he slept with Otto’s wife. (*Id.* at 298, 306).

b. Analysis

In order to successfully pass through the actual innocence “gateway,” a petitioner must support his allegation of constitutional error with new reliable evidence that was not presented at trial which can consist of “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). While affidavits may be submitted and considered new evidence, they must be met with skepticism. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 423 (1993) (affidavits made years after trial—purporting to exculpate a convicted prisoner by offering a new version of events—are “not uncommon” and “are to be treated with a fair degree of skepticism” insofar as they are “obtained without the benefit of cross-examination”). Here, Petitioner presents nine declarations, including his own, as “newly discovered evidence [that] would have probably changed the outcome of the trial.” (Doc. No. 1 at 4).

First, Petitioner himself submitted two unnotarized declarations. (Doc. No. 1 at 25-28). In his October 10, 2017 declaration, Petitioner states his sister, Roseann Castaneda, reported to him that “she had discovered that [] Otto had made statements contradicting his trial testimony – specifically with respect to the identification of [Petitioner] as the shooter”; and after receiving advice from another prisoner, Petitioner asked his sister to obtain declarations from other “witnesses” also reporting that Otto did not know who shot him, and named Petitioner as the shooter for a variety of reasons, as discussed below. (Doc. No. 1 at 25). In an additional February 13 declaration, of unknown year, Petitioner submits that his trial attorney failed to

1 present witnesses in his defense that would testify consistent with several of the declarations
 2 discussed below, mainly that Petitioner was at Mr. Bustamante's apartment at the time of the
 3 shooting.⁹ (Doc. No. 1 at 27). Petitioner's own declaration fails to constitute new reliable
 4 evidence for his claims of actual innocence. *Schlup*, 513 U.S. at 324. "A self-
 5 serving declaration is not the kind of evidence that meets the *Schlup* 'more than likely that no
 6 reasonable jury would have convicted him' standard." *Jackson v. Beard*, 2014 WL 2657536, at
 7 *7 (S.D. Cal. June 12, 2014) (citing *Herrera*, 506 U.S. 390, 423 (1993); *Baran v. Hill*, 2010 WL
 8 466153, at *7 (D. Or. Feb. 9, 2010); *McArdle v. Sniff*, No. EDCV 08-552 PSG (JC), 2009 WL
 9 1097324, at *5 (C.D. Cal. Apr. 20, 2009)). As recognized by Respondent, Petitioner's attempt to
 10 corroborate his own declaration with those of his sister and acquaintances does not serve to make
 11 his self-serving declaration more reliable. (Doc. No. 29 at 11 (citing *Porter v. Adams*, 2007 WL
 12 2703195, at *9 (E.D. Cal. Sept. 14, 2007) ("The court finds the declarations offered by petitioner
 13 to be rather low in terms of reliability, both because of their tardy presentation and because the
 14 declarants, consisting of petitioner and his family members, are hardly disinterested witnesses.")).

15 Second, Petitioner offers the following declarations from Natasha Gonzalez, Regina
 16 Escandon, Lydia Alarcon, and Roseann Castaneda.

- 17 • Ms. Castaneda, Petitioner's sister, submitted an unnotarized declaration on September 15,
 18 2017. (Doc. No. 1 at 12-14). She declared that she ran into Ms. Escandon in June 2017,
 19 and Ms. Escandon told her that Otto told her that he "really didn't know who shot him"
 20 and "actually didn't see the shooter," but he named Petitioner after being pressured by law
 21 enforcement to name someone. (*Id.* at 13). Ms. Escandon told Ms. Castaneda that she
 22 was scared to come forward earlier, and she was sorry for not "saying anything long ago."
 23 (*Id.* at 14).

24
 25 ⁹ Petitioner also states trial counsel failed to "investigate" and present evidence that he was on the phone
 26 with the mother of his child and texting another friend at the time of the shooting; and contends based on
 27 "personal inquiries and visual inspection" by family members, that surveillance video footage was not
 28 properly investigated/obtained by trial and appellate counsel. (Doc. No. 1 at 27-28). However, the
 argument advanced in the Petition as to why Petitioner is actually innocent is based solely on the theory
 that the victim did not know who shot him, and he falsely identified Petitioner because he was angry
 Petitioner slept with the mother of his children. (See Doc. No. 1 at 4-6).

- 1 • Ms. Escandon submitted a notarized declaration on June 30, 2017. (*Id.* at 19-20). She
2 declared that she spoke with Otto in May 2012. (*Id.* at 19). He talked about wanting to
3 stop using methamphetamine and that he was recently shot. (*Id.*). Ms. Escandon reports
4 that Otto told her he “was not sure” who shot him because a sports utility vehicle was
5 blocking his view, but he “thought” it was Petitioner, and Petitioner did not like him
6 because of the mother of Otto’s child. (*Id.*).
- 7 • Ms. Gonzalez submitted an unnotarized declaration on August 28, 2017. (*Id.* at 16-17).
8 She declared that she spoke with Otto in April 2012, the day after he was shot, and he told
9 her that he was not sure who shot him because he had been “up for three straight days”
10 under the influence of methamphetamine, and he did not tell law enforcement of his
11 uncertainty in identifying Petitioner because of his “hatred” toward Petitioner because he
12 slept with the mother of his child. (*Id.* at 16). She agreed to submit a declaration after
13 running into Ms. Escandon in 2017, and was hesitant to come forward because she did not
14 know if Otto was lying and she was afraid of him. (*Id.*).
- 15 • Ms. Alarcon submitted an unnotarized declaration on September 1, 2017. She declared
16 that she read the declaration of Ms. Escandon and found it to be accurate, as she was
17 present during Ms. Escandon’s conversation with Otto. (*Id.* at 23). Ms. Alarcon also
18 stated that she remembered the conversation because of “how cruel it was to hear that he
19 wrongly accused a man of shooting him knowing he wasn’t for sure” and “what bothered
20 [her] most about that conversation was the fact that [Otto] told [Ms. Escandon] that the
21 guys he accused of shooting him had it coming anyway, because of the unfinished
22 business he had with him in the first place.” (*Id.*).

23 As an initial matter, the declaration of Petitioner’s sister, Ms. Castaneda, is subject to
24 attack based on the inherent bias of a family member. *See Jones v. Taylor*, 763 F.3d 1242, 1249
25 (9th Cir. 2014)(testimony from family is less probative than testimony from disinterested
26 witnesses); *Perez v. Foulk*, 2015 WL 9487919, at *15 (C.D. Cal. Aug. 5, 2015); *Morgan v.*
27 *Martels*, 2009 WL 2591265, at *6 (E.D. Cal. Aug. 21, 2009)(“It has been routinely recognized
28 that family members are considered to be inherently biased.”). Moreover, as noted by

Respondent, all of the declarations are from acquaintances of Petitioner's sister, or each other; and all of the declarations were obtained around the same time in 2017, "when the women allegedly ran into each other on separate occasions by happenstance and discussed what [Otto] had told Ms. Gonzalez, Ms. Escandon and Ms. Alcaron separately, approximately five years of each other," all of which renders the reliability of their accounts questionable. *See Jones*, 763 F.3d at 1249 (fact that all three witnesses attesting to innocence came forward around the same time period years after the trial undercut witnesses' reliability); *see also Herrera*, 506 U.S. at 417 (affidavits were given over eight years after petitioner's trial and "no satisfactory explanation has been given as to why the affiants waited . . . to make their statements"). The Court also notes that the declarations are not entirely consistent with each other, nor do they consistently support Petitioner's argument that the victim falsely accused him of shooting him specifically in retaliation for sleeping with the mother of Otto's child. For instance, Ms. Castaneda declared that Ms. Escandon told her Otto said he named Petitioner as the shooter because he was pressured by law enforcement to say something, but Ms. Escandon stated that Otto told her he named Petitioner as the shooter because Petitioner did not like him because of his relationship with the mother of Otto's children. Finally, as noted by Respondent, the declarants do not provide eyewitness accounts of the shooting, only that they were told by Otto that he was unsure of who shot him and named Petitioner for disparate reasons. (Doc. No. 29 at 12).

Third, while not discussed with specificity in the Petition as support for his actual innocence claim, Petitioner includes several other declarations "supporting Petitioner's alibi" from Simon Melendrez, Ignacio Sanchez, Jr., Jesus Bustamante, and Rosemarie Domingo Morgan. (Doc No. 1 at 30-36). All of the declarations state that Petitioner was at a barbeque on April 27, 2012, the day of the shooting, from 4:30 or 5:00 to anywhere between 7:00 to 8:00 pm. (*Id.*). Petitioner claims in his own declaration that he asked his trial attorney to call several of these individuals as witnesses in his defense to testify as to his whereabouts "around the time of the alleged crimes," but his attorney declined to do so because they were gang members and would be discredited. (*Id.* at 27).

Respondent argues that this is not "new" evidence for the purposes of an actual innocence

1 analysis, because Petitioner was aware of the evidence prior to trial. (Doc. No. 29 at 11).
2 However, it is well-established in the Ninth Circuit that “new reliable evidence” under *Schlup*
3 requires only “newly presented evidence,” defined as evidence that was not presented at trial, as
4 opposed to “newly discovered evidence.” *Griffin*, 350 F.3d 962-63. Here, this “alibi” testimony
5 was not presented at trial, it was not discussed at trial, and Petitioner offered a reason that the
6 evidence was not introduced; thus, arguably under Ninth Circuit law it qualifies as “newly
7 presented” evidence for the Court to consider under the *Schlup* standard. *Cf. Machuca v.*
8 *Robertson*, 2018 WL 5270493, at *12-13 (C.D. Cal. Aug. 29, 2018) (evidence was not new even
9 though it was not presented at trial, because it was known and discussed at trial); *Norton v.*
10 *Arnold*, 2016 WL 1158590, at *11 (C.D. Cal. Feb. 12, 2016) (evidence was not new as it was
11 available to defense counsel at trial and the trial court was aware of the evidence); *Chestang*, 522
12 F. App’x at 391 (newly acquired witness declaration not sufficiently “new” to support actual
13 innocence claim because contents were within defendant’s knowledge at time of trial and no
14 explanation was given for not introducing it sooner). That said, as correctly noted by
15 Respondent, these declarations are from gang members, and those affiliated with gang members,
16 which casts significant doubt on their credibility. *See Schlup*, 513 U.S. at 332 (when deciding an
17 actual-innocence claim, the “likely credibility of the affiants bear on the probable reliability of
18 that evidence). In addition, the accounts offered in the declarations are not fully consistent with
19 each other. Each declarant identifies a slightly different window of time during which Petitioner
20 allegedly attended the barbeque; and the declarants disagree as to whether Petitioner left the
21 barbeque to meet his “baby momma” or to meet his sister. (Doc. No. 29 at 11 (citing Doc. No. 1
22 at 30-36)). Finally, as discussed above, declarations of Petitioner’s friends and acquaintances are
23 less reliable to the extent they would be considered a close relationship. *See House*, 547 U.S. at
24 552 (noting that testimony by friends or relations of the accused might have less probative value
25 than testimony from disinterested witnesses).

26 Based on the foregoing, the Court finds that Petitioner has failed to meet his burden of
27 showing that in light of all the evidence, including “new” evidence not introduced at trial, it is
28 more likely than not that no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327.

As argued by Respondent, there was ample evidence to support the verdict that Petitioner is guilty of the charged crimes, including consistent accounts of the shooting from the victim, corroboration with separate video footage, and testimony from experts and the victim that he was putting himself and his family at risk by testifying that Petitioner had shot him. (Doc. No. 29 at 13-14). Moreover, as noted by the state superior court in denying the merits of Petitioner's actual innocence claim on state habeas review,¹⁰

in an effort to undermine Mr. Otto's testimony, Defense counsel attempted during trial to impugn his credibility by arguing that (1) Mr. Otto named Petitioner as his shooter due to a grudge against the same; (2) The grudge existed because Petitioner had an affair with Mr. Otto's 'baby mama' []; (3) Mr. Otto had substantial active gang ties; and (4) Mr. Otto had demonstrated significant untruthfulness in connection with much of the testimony given by him during the trial. Although the information set forth in the declarations of Roseann Castaneda, Natasha Gonzalez, Regina Escandon, and Lydia Alarcon would serve to further undermine the veracity of Mr. Otto's eye witness identification of Petitioner, for purposes of California Penal Code section 1475, 'new evidence' is not evidence which is 'merely cumulative, corroborative, collateral or impeaching.'

(Doc. No. 26-9 at 2).

In light of all of the evidence, the Court cannot find that had the jury also been presented with the nine declarations which Petitioner now offers, it is more likely than not that no reasonable juror would have convicted him. Petitioner does not come forward with a credible declaration of guilt by another, nor credible declarations by an eyewitness to the shooting, nor exculpatory scientific evidence. Instead he offers his own declaration and declarations from his and his sister's acquaintances. Such hearsay and latter-day impeachment evidence rarely shows no reasonable juror would have believed a witness' account as testified to in court. *Clark v.*

¹⁰ Respondent generally notes the findings of the state court are entitled to a presumption of correctness. (Doc. No. 29 at 14). Respondent is correct that on federal habeas review, "a determination of a *factual issue* made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (emphasis added). However, the Court is constrained to note that deference to the state court decisions under § 2254(d) only applies to "any claim that was adjudicated on the merits in state court proceedings." Here, the Court is not considering the merits of Petitioner's claim of actual innocence asserted in his Petition; rather, Petitioner has proffered his actual innocence as cause to excuse his untimely petition under the *Schlup* actual innocence gateway. The deference to state court decision on the merits pursuant to Section 2254(d) has no application in the context of a *Schlup* claim because it pertains only to a "claim that was adjudicated on the merits" in state court. See *Duncan v. Ryan*, 2015 WL 13735818, at *199 (D. Ariz. Aug. 7, 2015).

1 *Lewis*, 1 F. 3d 814, 824 (9th Cir. 1993). Accordingly, the undersigned concludes Petitioner's
 2 claim of actual innocence does not implicate a fundamental miscarriage of justice nor does it fall
 3 within the narrow category of cases which pass through the *Schlup* actual innocence gateway.
 4 *See Coleman v. Allison*, 223 F.Supp.3d 1035, 1073-74 (C.D. Cal. 2015), *aff'd sub nom*, *Coleman*
 5 *v. Sherman*, 715 F. App'x 756 (9th Cir. 2018) ("In the few cases the Court has located in which
 6 the *Schlup* standard was found to have been met, the "new evidence" consisted of credible new
 7 evidence that the petitioner had a solid alibi for the time of the crime, numerous exonerating
 8 eyewitness accounts of the crime, DNA evidence excluding the petitioner and identifying another
 9 potential perpetrator, a credible confession by a likely suspect explaining that he had framed the
 10 petitioner, and/or evidence contradicting the very premise of the prosecutor's case against the
 11 petitioner.") (collecting cases).

12 The undersigned recommends the Petition be dismissed as untimely.

13 **III. CERTIFICATE OF APPEALABILITY**

14 State prisoners in a habeas corpus action under § 2254 do not have an automatic right to
 15 appeal a final order. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36
 16 (2003). To appeal, a prisoner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2);
 17 *see also* R. Governing Section 2254 Cases 11 (requires a district court to issue or deny a
 18 certificate of appealability when entering a final order adverse to a petitioner); Ninth Circuit Rule
 19 22-1(a); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). Where, as here, the court
 20 denies habeas relief on procedural grounds without reaching the merits of the underlying
 21 constitutional claims, the court should issue a certificate of appealability only "if jurists of reason
 22 would find it debatable whether the petition states a valid claim of the denial of a constitutional
 23 right and that jurists of reason would find it debatable whether the district court was correct in its
 24 procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Where a plain procedural bar
 25 is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist
 26 could not conclude either that the district court erred in dismissing the petition or that the
 27 petitioner should be allowed to proceed further." *Id.* Here, reasonable jurists would not find the
 28 undersigned's conclusion debatable or conclude that petitioner should proceed further. The

undersigned therefore recommends that a certificate of appealability not issue.

Accordingly, it is **RECOMMENDED**:

1. Respondent's Motion to Dismiss (Doc. No. 24) be **GRANTED**.
2. The Petition (Doc No. 1) be dismissed as untimely.
3. Petitioner be denied a certificate of appealability.

NOTICE TO PARTIES

These findings and recommendations will be submitted to the United States district judge assigned to the case, pursuant to the provisions of U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, a party may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Dated: August 24, 2022


HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE